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No. 05-1449

IN THE

Supreme Court of the United States

TIMOTHY B. HUFFMAN,
Petitioner,

v.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Michigan Court of Appeals

REPLY BRIEF

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Nothing in the State's Opposition refutes that Petitioner's conviction under the Michigan indecent exposure statute raises significant and novel First Amendment questions warranting this Court's review. To the contrary, by adopting the confused reasoning of the Michigan Court of Appeals, the State's brief serves merely to underscore why this Court's involvement – by either plenary review or summary reversal – is needed. Even if the Court declines review on First Amendment grounds, the Court should summarily reverse Petitioner's conviction because he lacked fair warning that his actions were within the scope of Michigan's indecent exposure statute.

I. The State's Opposition Underscores The Need For This Court's Review To Resolve Significant First Amendment Questions.

The central thrust of the State's Opposition – which denies neither the far-reaching chilling effect of the Court of Appeals' opinion nor the dangerous consequences of its logic for important First Amendment principles – is simply to repeat the Michigan Court of Appeals' flawed logic. That line of reasoning rests upon a mischaracterization of the activity for which Petitioner was convicted and a fundamental miscomprehension of the distinction between "content-based" and "content-neutral" application of restrictions on expression. Pet. at 15-17. The reasoning also conflicts with the Court's application of searching scrutiny to governmental attempts to restrict sexually explicit content that is not obscene, whether on cable television, *see United States v. Playboy Entertainment Group*, 529 U.S. 803, 814 (2000); *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 756 (1996), or in other media, *see, e.g., Reno v. ACLU*, 521 U.S. 844, 874-76 (1997); *Sable Communications of California, Inc. v. FCC*,

492 U.S. 115, 126 (1989); *see also Erznoznick v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975).

The State tries to distinguish this case from the Court's prior cases "addressing nudity, or sexually explicit scenes, in a movie," by arguing that those cases involved "an allegation that the movie was obscene." Opp. at 5. But that is precisely the point. Acceptance of the Court of Appeals' notion that the "expressive conduct" rationale of cases such as *United States v. O'Brien*, 391 U.S. 367 (1968), *City of Erie v. Pap's AM*, 529 U.S. 277 (2000) and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), extends also to *images* of nudity would circumvent entirely any need to prove that a movie, television program, or book was obscene in order to criminalize its distribution or display. Under that theory, virtually every attempt to restrict or punish the expression of indecent content could be recast as punishing the actors for the "conduct" of appearing nude in such films, or of the directors, station operators, or theater owners for the "conduct" of "exposing the persons" of the actors.[1] This Court should clarify that the logic of its nude dancing cases cannot be expanded in this manner.

The State argues nonetheless that application of the public indecency statute to Petitioner's program is justified because it was aired on a public access channel. *See* Opp. at 6-10. But neither Petitioner's conviction nor the constitutional principles at stake in this case turn in any way on the type of the cable television channel on which his program was shown. The Court of Appeals' reasoning – that

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[1] Although the State tries to make much of its claim that "it is clear that the film was of the Petitioner himself," Opp. at 4, Petitioner's conviction did not turn on that fact. Mich. Comp. Laws § 750.335a, under which Petitioner was convicted, also criminalizes exposing "the person of another," and the jury was in fact instructed that it could also convict Petitioner if the cable program at issue exposed the genitals "of another." Trial Tr. at 145-46.

the display of televised images of nudity is "conduct" entitled only to the lesser degree of constitutional protection in *O'Brien* and its progeny, *see* Pet. App. 14a – applies irrespective of the medium by which the images are transmitted. Nothing limits this flawed principle to public access television channels as opposed to privately-run cable channels. Indeed, the rationale of *Barnes* and *Pap's*, expressly adopted by the Court of Appeals, applies even where the audience is fully consenting. *See Barnes*, 501 U.S. at 566 (plurality) (applying public nudity statute to club where only consenting adult viewers were present); *see also id.* at 575 (Scalia, J., concurring in the judgment); *Pap's*, 529 U.S. at 295-96 (plurality). Thus, the Court of Appeals' logic, if accepted, would apply equally to the display of films in a movie theater, where the audience is willing and fully on notice of what sort of content to expect.

The State's claim that the Constitution permits a "blanket prohibition" on displaying nudity on public access channels, Opp. at 10, is also entirely at odds with this Court's decision in *Denver Area*, which struck down a federal regulation that imposed limits on "patently offensive" programming on public access channels. 518 U.S. at 760-66. And this case simply does not present the question of whether individual public access channel operators might properly fashion rules restricting the display of nude or indecent images on their channels to certain times of day – although *Playboy* holds that such time restrictions would need to satisfy strict scrutiny. 529 U.S. at 814.[2] Instead, this case involves a total criminal ban on the televised display of nude images on *any* television channel – cable, broadcast, public access, or otherwise – irrespective of the time of the broadcast, so long

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[2] In any event, Petitioner's program was cablecast late at night, consistent with GRTV's policies. *See* Pet. at 2; Br. Amici Curiae Alliance for Comm'ncs Democracy at 5 n.4.

as someone might find the images "offensive." This the First Amendment does not permit.

The State observes that Petitioner's program is different from films like *Schindler's List* in which scenes of nudity are part of a longer work and on this basis downplays the threat posed by the decision below to First Amendment freedoms. *See* Opp. at 5-6. Contrary to the State's assertion, however, the nudity for which Petitioner was convicted was part of a longer television program and cannot be distinguished on that basis. More importantly, the First Amendment questions raised by this case are no less significant because Petitioner's program may be cruder than other films or programs also containing nudity. This Court has repeatedly insisted that outside the narrow realm of obscenity, the ability of speech to shock or offend is not a basis for banning it. *See, e.g.*, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002) ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities."); *Playboy*, 529 U.S. at 826 ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977); *Cohen v. California*, 403 U.S. 15, 25 (1971); *Winters v. New York*, 333 U.S. 507, 510 (1948). It vindicates rather than degrades free speech principles to say that they apply with equal force to Petitioner's program as well as notable films. *See Playboy*, 529 U.S. at 818 ("The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed."); *see also Cohen*, 403 U.S. at 25.

II. If The Court Does Not Grant Plenary Review, It Should Summarily Reverse On Due Process Grounds.

In response to Petitioner's argument that summary reversal is warranted because he had no "fair warning" that he could be subject to criminal penalties for the cablecast of his program, the State cites to the void-for-vagueness standard set forth in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). Opp. at 15-16. But the void-for-vagueness doctrine is not at issue here. Instead, Petitioner is challenging the Court of Appeals' unprecedented and unforeseeable construction of Michigan's public indecency statute. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) (distinguishing the problem of vagueness from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"). The question under this Court's fair warning jurisprudence is whether it was clearly established at the time Petitioner aired his program that his conduct was criminal under the indecent exposure statute. *Id.* at 270-71. The answer is plainly no: although the statute may have given Petitioner fair warning that exposing oneself in a public place is criminal, the statute did not give him fair warning that he could be criminally liable for displaying nude images on television. Pet. at 24-26.

In an attempt to avoid this inevitable conclusion, the State resorts to the tautology of assuming that Petitioner violated the statute, and then concluding that, as a result, Petitioner must have had fair warning that his conduct was criminal. Opp. at 17. The proper question, however, is "whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267

(emphasis added). Respondent does not even attempt to argue that the text or prior judicial interpretations of the statute gave Petitioner such fair warning. To the contrary, Respondent concedes that "[t]he statute has been generally applied to exposures in the public," Opp. at 4, which is how the Michigan courts had consistently interpreted the statute, Pet. at 25. Particularly in light of this Court's decisions recognizing significant First Amendment protection for "indecent" expression on cable and in other media, Petitioner could not have predicted that he could be subject to criminal penalties for the airing of his cable program.

The State's efforts to distinguish *Rabe v. Washington*, 405 U.S. 313 (1972) (per curiam), are unavailing. Opp. at 17-18. In *Rabe*, as in this case, the court interpreted a criminal statute in a novel and unforeseeable way, expanding its scope to cover an activity the statute had not reached before. That *Rabe* involved an obscenity conviction and that this case does not is an immaterial distinction. *See* Opp. at 17. Both Rabe's and Petitioner's convictions were "affirmed under a statute with a meaning quite different from the one [each of them] was charged with violating." *Rabe*, 405 U.S. at 315 (per curiam). Petitioner's conviction, like Rabe's, should be summarily reversed. Pet. at 27-28.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case set down for plenary hearing on the merits or, alternatively, the conviction should be summarily reversed.

Respectfully submitted,

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